

DEPARTMENT OF AGRICULTURE**Agricultural Marketing Service****7 CFR Parts 916 and 917****[Docket No. FV95-916-1FIR]****Nectarines and Peaches Grown in California; Revision of Handling Requirements for Fresh Nectarines and Peaches****AGENCY:** Agricultural Marketing Service, USDA.**ACTION:** Final rule.

SUMMARY: The Department of Agriculture (Department) is adopting as a final rule, with appropriate modifications, the provisions of an interim final rule which revised the handling requirements for California nectarines and peaches by modifying the size, maturity, container, and pack requirements for fresh shipments of these fruits, beginning with 1995 season shipments. This rule enabled handlers to continue shipping fresh nectarines and peaches meeting consumer needs in the interest of producers, handlers, and consumers of these fruits.

EFFECTIVE DATE: June 12, 1995.

FOR FURTHER INFORMATION CONTACT: Kenneth Johnson, Marketing Specialist, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, Room 2523-S, Washington, DC 20090-6456; telephone: (202) 720-2861; or Terry Vawter, California Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, 2202 Monterey Street, Suite 102B, Fresno, California, 93721; telephone: (209) 487-5901.

SUPPLEMENTARY INFORMATION: This rule is issued under Marketing Agreement and Marketing Order Nos. 916 and 917 [7 CFR parts 916 and 917] regulating the handling of nectarines and peaches grown in California, hereinafter referred to as the orders. The orders are effective under the Agricultural Marketing Agreement Act of 1937, as amended [7 U.S.C. 601-674], hereinafter referred to as the Act.

The Department is issuing this rule in conformance with Executive Order 12866.

This rule has been reviewed under Executive Order 12778, Civil Justice Reform. This rule is not intended to have retroactive effect. This rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Act provides that administrative proceedings must be exhausted before

parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with the Secretary a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After the hearing the Secretary would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction in equity to review the Secretary's ruling on the petition, provided a bill in equity is filed not later than 20 days after the date of the entry of the ruling.

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Administrator of the Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

There are about 300 California nectarine and peach handlers subject to regulation under the orders covering nectarines and peaches grown in California, and about 1,800 producers of these fruits in California. All of the handlers sell peaches, while three out of four handlers sell nectarines. Small agricultural service firms have been defined by the Small Business Administration [13 CFR 121.601] as those whose annual receipts from all sources are less than \$5,000,000 and small agricultural producers are defined as those whose annual receipts are less than \$500,000. The majority of handlers have sales of less than \$5,000,000 and may be classified as small entities. In recent seasons, only about ten handlers had combined peach and nectarine sales of \$5,000,000 or more. In recent years, average combined sales of peaches and nectarines per handler have been about \$600,000. Typically, about three-fourths of peach and nectarine handlers have sales of less than the average for the industry.

The Nectarine Administrative Committee (NAC) and the Peach Commodity Committee (PCC) met on

December 7, 1994, and unanimously recommended that the handling requirements for California nectarines and peaches be revised, respectively. These committees meet prior to and during each season to review the rules and regulations effective on a continuous basis for California nectarines and peaches under the orders. Committee meetings are open to the public, and interested persons may express their views at these meetings. The Department reviews committee recommendations and information, as well as information from other sources, and determines whether modification, suspension, or termination of the rules and regulations would tend to effectuate the declared policy of the Act.

Container and Pack Requirements (Nectarines)

Section 916.350 specifies container and pack requirements for fresh nectarine shipments. Paragraph (a)(4)(iv) of § 916.350 specifies the tray-pack size designations which must be marked on loose-filled or tight-filled containers, depending on the size of the fruit. The size designations specify the maximum number of nectarines in a 16-pound sample for each tray-pack size designation. This rule revises paragraph (a)(4)(iv) of § 916.350 by modifying two size designations for the weight-count standards in Column B of TABLE I for early-season and mid-season nectarine varieties. This table was added prior to the 1994 season. Research conducted by the NAC indicated that early-season and mid-season fruit weigh less than late-season fruit and therefore different weight-count standards were established for late-season fruit. Results from further research during the 1994 season suggest that some minor modifications of TABLE I are necessary to provide for more accurate weight-count standards for early-season and mid-season nectarines.

The NAC unanimously recommended these revised weight-count standards for nectarines after a comprehensive review of the relationships between the tray-pack containers and loose-filled or tight-filled containers for early-season and mid-season nectarine varieties. Specifically, the NAC's recommendation provides that the maximum number of nectarines of size 80 in a 16-pound sample of early-season and mid-season fruit is more appropriately 75 rather than 76. Also, the maximum number of nectarines of size 64 in a 16-pound sample of early-season and mid-season fruit is more appropriately 55 rather than 56.

Pack regulations provide for uniform packing practices. In particular, weight-

count standards provide for comparability between fruit packed in loose-filled or tight-filled containers and fruit packed in tray-pack containers.

According to the NAC, packers occasionally moved fruit from tray-pack containers to loose-filled or tight-filled containers. This activity has led to an awareness, in regard to early-season and mid-season varieties, that fruit which was of proper size when tray-packed exceeded the maximum number of nectarines for the 16-pound sample for corresponding loose-filled or tight-filled containers. In some instances, these samples would need additional pieces of fruit to meet the 16-pound weight requirement, thus causing the pack to be marked smaller than its equivalent tray-pack size. When packs are marked with a smaller size, the container is generally sold for a lower price. Revised and refined weight-count standards for early-season and mid-season varieties should provide for more accurate marking of size when packed in loose-filled or tight-filled containers compared to equivalent sizes that are tray packed. These regulations provide for uniformly packed containers of nectarines. The NAC's recommendations were also thoroughly discussed at a nectarine size subcommittee meeting held on November 22, 1994, that involved members of the industry and USDA staff.

Currently, under the marketing order the minimum maturity requirement for nectarines grown in California is U.S. Mature, which means that the nectarine has reached the stage of growth which will insure a proper completion of the ripening process. A higher maturity standard is defined as California "Well Matured," which is a condition distinctly more advanced than mature.

This rule adds a definition of "tree ripe" to paragraph (b) of section 916.350. According to the NAC, "tree ripe" is an optional marking without regard to maturity that is stamped on containers of nectarines. Currently there is no definition of "tree ripe". As a result of inquiries from the industry and the trade, the NAC recommended defining "tree ripe" so that it has a standard meaning. In the past, there has been no definition of "tree ripe" although fruit boxes marked "tree ripe" had to meet the minimum marketing order maturity standard of U.S. Mature. Handlers have been able to stamp any maturity level, including U.S. Mature, as "tree ripe" due to a lack of any definition for this nomenclature. The NAC stated that in some instances, handlers have stamped "tree ripe" on every box of fruit they packed all

season. There is growing concern within the industry that fruit packed at the lower level of acceptable maturity do not represent what is most commonly perceived as tree ripe. By requiring that fruit must be at a minimum California Well Matured maturity standard in order to be marked "tree ripe" will help ensure that buyer expectations are met.

Maturity Requirements (Nectarines)

Section 916.356 specifies maturity requirements for fresh nectarines in paragraph (a)(1)(i), including TABLE I, for fruit being inspected and certified as meeting the maturity requirements for "well matured" fruit. Such maturity requirements are based on maturity measurements which are generally recognized in terms of maturity guides (e.g., color chips) specified in paragraph (a)(1)(i) and TABLE I of § 916.356 for nectarines. This rule revises TABLE I of paragraph (a)(1)(i) of § 916.356 for nectarines to change the maturity guide for one nectarine variety.

Specifically, a change in color standard was recommended for Alshir Red from L to J. In a corresponding action, the tolerance for the Alshir Red variety that states "except not less than an aggregate area of 95% of fruit surface shall meet the color standard established for the variety" is deleted.

These changes for this nectarine variety are based on a continuing review of its individual maturity characteristics, and the identification of the appropriate color chip corresponding to the "well matured" level of maturity for such variety.

Size Requirements (Nectarines)

Section 916.356 specifies size requirements for fresh nectarines in paragraphs (a)(2) through (a)(9). This rule revises § 916.356 to establish variety-specific size requirements for fourteen nectarine varieties that were produced in commercially significant quantities of more than 10,000 packages for the first time during the 1994 season.

Size regulations are put in place to improve fruit quality by allowing fruit to stay on the tree for a greater length of time which not only improves maturity and therefore the quality of the product but also size and increases the number of packed boxes of nectarines per acre. This provides greater consumer satisfaction, more repeat purchases and therefore increases returns to growers. Varieties recommended for specific size regulation have been reviewed and recommendations are based on the characteristics of the variety to attain minimum size. Paragraph (a)(4) is revised to include the Arctic Glo, May

Jim, Red Glo, and Royal Glo varieties; and paragraph (a)(6) of § 916.356 is revised to include the Arctic Queen, How Red, La Pinta, Red Fred, Royal Red, Ruby Diamond, Spring Bright, Summer Blush, 424-195, and Nectarine 23 varieties.

This rule also revises § 916.356 to remove six nectarine varieties from the variety-specific size requirements specified in the section because less than 5,000 packages of each of these varieties were produced during the 1994 season. Paragraph (a)(2) of that section is revised to remove the Aurelio Grand and Maybelle nectarine varieties; paragraph (a)(4) is revised to remove the Grand Stan variety; and paragraph (a)(6) is revised to remove the Autumn Grand, Le Grand, and Super Red nectarine varieties. Nectarine varieties removed from the nectarine variety-specific list become subject to the non-listed variety size requirements specified in paragraphs (a)(7), (a)(8), and (a)(9) of § 916.356.

The NAC recommended these changes in the minimum size requirements based on a continuing review of the sizing and maturity relationships for these nectarine varieties, and consumer acceptance levels for various sizes of fruit. This rule is designed to establish minimum size requirements for fresh nectarines consistent with expected crop and market conditions.

This rule also corrects an error in the minimum size requirements for Royal Glo variety nectarines from size 80 to size 88. The 1995 seasonal regulations list a minimum size of 80 for the Royal Glo nectarine variety. Royal Glo variety nectarines are an early season variety and are usually harvested in mid to late May. Nectarines are assigned minimum sizes, based on the time of harvest and size characteristics of specific nectarine varieties. Nectarines harvested in mid to late May are usually smaller, therefore the minimum size 88 category is more responsive to market needs. Based on this criterion, the Royal Glo variety nectarine should have been in the minimum size 88 category. As such, the reference to the Royal Glo variety nectarine is added to § 916.356 paragraph (a)(4) and removed from paragraph (a)(6) under that section.

Container and Pack Requirements (Peaches)

Section 917.442 currently specifies container and pack requirements for fresh peach shipments. Paragraph (a)(4)(iv) of § 917.442 specifies the tray-pack size designations which must be marked on loose-filled or tight-filled containers, depending on the size of the fruit. The

size designations specify the maximum number of peaches in a 16-pound sample for each tray pack size designation. This rule revises paragraph (a)(4)(iv) of § 917.442 by modifying three size designations for the weight-count standards in Column B of TABLE I for early-season and mid-season peach varieties. Research conducted by the PCC indicated that early-season and mid-season fruit weighs less than late-season fruit and the weight-count standards were, therefore, modified based on that consideration. Results from the 1994 season suggest that some minor modifications of TABLE I are necessary to further correct the weight-count differences between early-season and mid-season peaches, and late-season peaches.

The PCC unanimously recommended the revised container marking requirement changes for peaches after a comprehensive review of the appropriate size pack-count relationships between the tray-pack containers and loose-filled or tight-filled containers for early-season and mid-season peach varieties prior to the 1995 season. Specifically, the PCC's recommendation provides that the maximum number of peaches of size 84 in a 16-pound sample of early-season and mid-season fruit is more appropriately 83 rather than 85. Also, the maximum number of peaches of size 70 in a 16-pound sample of early-season and mid-season fruit is more appropriately 64 rather than 66. The maximum number of peaches of size 60 in a 16-pound sample of early-season to mid-season fruit is more appropriately 50 rather than 47.

In making this revision, a conforming change is required in § 917.459 (a)(4)(iii) which is referenced in TABLE I. Section 917.459 (a)(4)(iii) currently provides a maximum number of 85 peaches in a 16-pound sample of early-season and mid-season fruit. This revision will modify the maximum number of peaches in a 16-pound sample of early-season and mid-season fruit to 83 pieces of fruit from the current 85 pieces of fruit.

Pack regulations provide for uniform packing practices. In particular, weight-count standards provide for equality between packs of loose-filled or tight-filled sizes to fruit sizes packed in tray-pack styles. Varieties harvested early in the season and packed in loose-filled or tight-filled pack styles have had more difficulty being equal in size to tray-pack style of packing.

According to the PCC, packers occasionally moved fruit from tray-pack styles of pack to loose-filled or tight-filled pack styles. This activity has led

to an awareness, especially in regard to early-season varieties, that fruit which was of proper size when tray-packed exceeded the maximum number of nectarines for the 16-pound sample for corresponding loose-filled or tight-filled pack size. In some instances, these samples would need as many as 10 additional pieces of fruit to meet the 16-pound weight requirement, thus causing the pack to be "marked" smaller than its equivalent tray-pack size. When packs are "marked" smaller this causes the container to be sold for a lower price. During the 1994 season new weight-count assignments for early varieties were in place. Research continued with the purpose of possible refinement of those weight-count assignments.

Revised and refined weight-count standards for early varieties should provide for more accurate marking size when packed in loose-filled or tight-filled pack styles compared to equivalent sizes that are tray packed. These regulations provide for uniformly packed containers of peaches. The PCC's recommendations were also thoroughly discussed at a peach size subcommittee meeting held on November 22, 1994, that involved members of the industry and USDA staff.

Currently, under the marketing order the minimum maturity requirement for peaches grown in California is U.S. Mature, which means that the peach has reached the stage of growth which will insure a proper completion of the ripening process. A higher maturity standard is defined as California "Well Matured," which is a condition distinctly more advanced than mature.

This rule adds a definition of "tree ripe" to section 917.442 paragraph (b). According to the PCC, "tree ripe" is an optional marking without regard to maturity that is stamped on containers of peaches. Currently there is no definition of "tree ripe". As a result of inquiries from the industry and the trade, the PCC wants to define "tree ripe" so that its interpretation is consistent with other descriptive markings. In the past there has been no definition of tree ripe although fruit boxes marked "tree ripe" had to meet minimum marketing order standards. Handlers have been able to stamp any maturity level, including U.S. Mature, as "tree ripe" due to a lack of any definition for this nomenclature. The PCC states that in some instances in the past, it is known that some handlers have stamped "tree ripe" on every box of fruit they packed all season. There is growing concern among the industry that fruit packed at the lowest levels of maturity do not represent what is most

commonly perceived as tree ripe. By requiring fruit be at a minimum California "Well Matured" maturity standard in order to be marked "tree ripe" will help ensure that buyer expectations are met.

Maturity Requirements (Peaches)

Section 917.459 specifies maturity requirements for fresh peaches in paragraphs (a)(1)(i) and (ii), including TABLE I, for fruit being inspected and certified as meeting the maturity requirements for "well matured" fruit. Such maturity requirements are based on maturity measurements which are generally recognized in terms of maturity guides (e.g., color chips) specified in paragraphs (a)(1)(i) and (ii), including TABLE I of § 917.459 for peaches. This rule revises TABLE I of paragraph (a)(1)(ii) of § 917.459 for peaches to change the maturity guide for the David Sun, King's Red, Crimson Lady and Johnny's White peach varieties. The reference to TABLE I of paragraph (a)(1)(ii) is a change from the interim final rule which incorrectly cited the revisions in TABLE I under paragraph (a)(2)(ii).

The SPI recommended these changes for these peach varieties based on a continuing review of their individual maturity characteristics, and the identification of the appropriate color chip corresponding to the "well matured" level of maturity for such varieties.

Size Requirements (Peaches)

Section 917.459 specifies size requirements for fresh peaches in paragraphs (a)(2) through (a)(6), and paragraphs (b) and (c). This rule revises § 917.459 to establish variety-specific size requirements for eight peach varieties that were produced in commercially significant quantities of more than 10,000 packages for the first time during the 1994 season.

Size regulations are put in place to improve fruit quality by allowing fruit to stay on the tree for a greater length of time which not only improves maturity and therefore the quality of the product but also size and increases the number of packed boxes of peaches per acre. This provides greater consumer satisfaction, more repeat purchases and therefore increases returns to growers. Varieties recommended for specific size regulation have been reviewed and recommendations are based on the characteristics of the variety to attain minimum size. In § 917.459 paragraph (a)(5) is revised to include the Snow Brite and Sugar May peach varieties; and paragraph (a)(6) is revised to include the August Delight, Autumn

Rose, Red Boy, Royal Lady, September Snow, and Summer Sweet peach varieties.

This rule also revises § 917.459 to remove two peach varieties from the variety-specific size requirements specified in that section, because less than 5,000 packages of each of these varieties were produced during the 1994 season. In § 917.459 paragraph (a)(4) is revised to remove the Morning Sun peach variety; and paragraph (a)(6) is revised to remove the Golden Lady peach variety. Peach varieties removed from the variety-specific list become subject to the non-listed variety size requirements specified in paragraphs (b) and (c) of § 917.459.

The removal of the Morning Sun variety from paragraph (a)(4) results in there being no varieties regulated within size 84 for the 1995 season. Since the variety-specific list is subject to change from one season to another, the Department wishes to reserve paragraph number § 916.459 (a)(4) for future regulation of peaches at size 84. The PCC unanimously recommended these changes in the minimum size requirements based on a continuing review of the sizing and maturity relationships for these peach varieties, and the consumer acceptance levels for various sizes of fruit. This rule is designed to establish minimum size requirements for fresh peaches consistent with expected crop and market conditions. This rule reflects the committees' and the Department's appraisal of the need to revise the handling requirements for California nectarines and peaches, as specified. The Department's determination is that this rule will have a beneficial impact on producers, handlers, and consumers of California nectarines and peaches.

This rule establishes handling requirements for fresh California nectarines and peaches consistent with expected crop and market conditions, and will help ensure that all shipments of these fruits made each season will meet acceptable handling requirements established under each of these orders. This rule will also help the California nectarine and peach industries provide fruit desired by consumers. This rule is designed to establish and maintain orderly marketing conditions for these fruits in the interest of producers, handlers, and consumers.

The interim final rule concerning this action was published in the March 21, 1995, **Federal Register** (60 FR 14891),

with a 30-day comment period ending April 20, 1995. Two comments were received.

One comment was received from Mr. Jonathan Field, manager of the NAC and PCC, in support of the committees' recommendations. Another comment was received from Chief Counsel for Advocacy of the United States Small Business Administration (SBA). The SBA contended that the Department failed to follow its own procedures for informal rulemaking by not publishing the votes on the committees' recommendations. The SBA further stated that the interim final rule does not relate how the committees determined what the impact of the rule would be on growers, handlers and consumers. SBA further stated that the interim final rule provides no evidence of the impact that these rule changes will have on small businesses.

In response to the SBA concerns, the Department followed its informal rulemaking procedures in reviewing the committees' recommendations. The Department reviewed and considered the information received from the NAC and PCC as it relates to alternative recommendations and the impact of this rule on small businesses (i.e., growers and handlers).

The Department disagrees with SBA's assertion that the interim final rule fails to follow the Department's informal rulemaking procedures and the requirements for the Regulatory Flexibility Act. The SBA's concerns regarding this action have been properly addressed in this document and the interim final rule.

The revision of the handling requirements for fresh peaches and nectarines adopted by this final rule will apply uniformly to all handlers in the industry, whether small or large, and there are no known additional costs incurred by small handlers. The stabilizing effects of the handling regulation impact both small and large handlers positively by helping them maintain their markets by meeting consumer demand.

Based on the above, the Administrator of the AMS has determined that this rule will not have a significant economic impact on a substantial number of small entities.

After consideration of all relevant matters presented, the information and recommendations submitted by the committees, and other information, it is found that the rule, as hereinafter set

forth, will tend to effectuate the declared policy of the Act.

List of Subjects

7 CFR Part 916

Marketing agreements, Nectarines, Reporting and recordkeeping requirements.

7 CFR Part 917

Marketing agreements, Peaches, Pears, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR parts 916 and 917 are amended as follows:

1. The authority citation for 7 CFR parts 916 and 917 continues to read as follows:

Authority: 7 U.S.C. 601-674.

PART 916—NECTARINES GROWN IN CALIFORNIA

The interim amendments to 7 CFR part 916 which were published at 60 FR 14891 on March 21, 1995, are adopted as a final rule with the following change:

§ 916.356 [Amended]

2. In § 916.356, paragraph (a)(4) is amended by adding the name "Royal Glo," immediately following the name "Rose Diamond," and paragraph (a)(6) is amended by removing the name "Royal Glo,".

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PART 917—FRESH PEARS AND PEACHES GROWN IN CALIFORNIA

The interim amendments to 7 CFR part 917 which were published at 60 FR 14891 on March 21, 1995, are adopted as a final rule with the following change:

§ 917.459 [Corrected]

3. On page 14896, first column, in the amendatory instruction number 5, the reference to paragraph "(a)(2)(ii)" is corrected to "(a)(1)(ii)" and in the second column, under paragraph designated § 917.459, the reference to "(a)(2)(ii)" is corrected to read "(a)(1)(ii)".

Dated: June 6, 1995.

Sharon Bomer Lauritsen,

Deputy Director, Fruit and Vegetable Division.

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